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Monterey, California



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A CLOSER LOOK AT THE A-76 PROCESS: ANALYSIS
OF OPINIONS FROM THE GENERAL ACCOUNTING
OFFICE

by

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March 2002

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**A CLOSER LOOK AT THE A-76 PROCESS: ANALYSIS OF
OPINIONS FROM THE GENERAL ACCOUNTING OFFICE**

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Submitted in partial fulfillment of the
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ABSTRACT

This thesis identifies the case principles and trends involving A-76 Process issues brought before the General Accounting Office. It reviews the background, history, issues and current methods of applying the A-76 Process in the Department of Defense. It then categorizes and analyzes the A-76 protest decisions handed down from the Comptroller General from January 1, 1997 to December 31, 2001. Following the review and analysis, the interpretations of the statutory requirements by the Comptroller General are examined to determine if the current design of the A-76 process is being applied as it was originally designed. It also examines protest decision trends to determine what changes are needed to mitigate the risk of future A-76 protests

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I. INTRODUCTION

A. BACKGROUND

As early as 1955, the Executive Branch of the U.S. Government encouraged Federal agencies to obtain commercially available goods and services from the private sector whenever the agency determined that such action was cost effective. [Ref. 25] An Eisenhower Administration executive directive is the foundation the A-76 process is built on. Although the A-76 process' origins date back to 1955, for over three decades (1955 through the Mid-1980's) very little emphasis was ever placed on the Executive Branch's 1955 recommendation. With the fear of a potential Third World War firmly looming in both the minds of many Americans and the Government officials who were elected to protect them, controlling the growth of Government, and more specifically the growth of the Department of Defense (DoD), was not viewed as a major issue.

The build up of the U.S. military and the pinnacle of U.S. Defense spending came to an abrupt halt shortly after the Berlin Wall fell in November of 1989. [Ref. 2] For little over a decade (1985-1997), DoD reduced procurement spending by approximately 69%, personnel by 32%, and the overall defense budget by 35%. [Ref. 23] Between 1989 and 1997, while DoD had reduced active duty personnel by 32%, it had only reduced the number of personnel performing infrastructure functions by 28%. [Ref. 5] A necessary economic need for efficiency continued to press DoD to look for new ways to reduce Defense spending. As a result, numerous measures were taken over this period in an attempt

to reduce the amount of Defense Dollars being spent every year.

One such attempt to become more cost-efficient was to reduce the DoD infrastructure through the implementation of the Base Closure and Realignment and Commission (BRAC). Even with BRAC resulting in the closure of a number of bases throughout the United States, the DoD infrastructure costs continued to absorb a significant portion of the DoD budget. The idea of "doing more with less" began to emerge as more than just a popular cliché to be touted throughout the Pentagon and Congress, it emerged as a fact to be taken into account when business decisions were being made throughout the DoD. "The U.S. Navy is operating in an environment of reduced budgets while being required to maintain high levels of readiness to meet operational requirements." [Ref. 20] The oversized infrastructure costs and reduction in procurement spending ultimately pushed DoD officials into an even deeper corner where they were forced to look even harder for more options to become more cost efficient.

One avenue chosen by the DoD was to complete a comprehensive review of the United States' defense posture, policy and programs. This comprehensive review became known as the Quadrennial Defense Review (QDR). This QDR resulted in a number of different defense initiatives, including the Defense Reform Initiative (DRI) Report signed by the Secretary of Defense, William Cohen, in November of 1997. This report set out a plan to transform the DoD for the 21st century. The DRI goals were to revolutionize business affairs within the DoD by incorporating better

business practices from the private sector. The revolution in business affairs included taking a closer look at how efficiently the Government was performing many of its basic internal functions. The DRI called for the subjecting of more than 120,000 civil-service personnel positions to the A-76 process from 1998-2002. To put this number in perspective, the number is three times larger than the number of positions that were reviewed over the past two decades.

With the fear of the Cold War over and the reality of doing more with less becoming common practice throughout the DoD, the A-76 process became the tool of choice for new ways to become more efficient. Similar to many processes used within the Government and the private sector, very few are considered fundamentally perfect. The A-76 process requires a minimum of two competing sides. When one side loses, questions inevitably arise. If the answers are insufficient, protests are often made. The Comptroller General at the General Accounting Office (GAO) addresses these protests.

B. PURPOSE

This thesis identifies the case principles and trends involving the A-76 process issues brought before the GAO. It reviews the background, history, issues and current methods of applying the A-76 process in the DoD. It then categorizes and analyzes the A-76 protest decisions handed down from the Comptroller General from January 1, 1997 to December 31, 2001. Following the review and analysis, it also examines protest decision trends to determine what

changes are needed to mitigate the risk of A-76 protests from occurring in the future.

C. RESEARCH OBJECTIVE

The primary objective of this research is to determine if the protests made about the A-76 process are uncovering any major deficiencies. If so, the goal is to identify the deficiencies and make recommendations on how the DoD can properly address them. The ultimate result is to improve the overall process.

D. RESEARCH QUESTIONS

1. Primary Research Question

What are the key case principles and trends involving the A-76 Process brought before the General Accounting Office, and how might this information be used to improve the Department of Defense's Acquisition Process?

2. Secondary Questions

In answering the primary question, the following secondary questions will be addressed:

- a. What is the history and background of the A-76 process?
- b. How has the A-76 process been applied throughout the DoD?
- c. What problems, if any, have resulted from DoD's application of the A-76 process?
- d. What benefits, if any, has DoD realized because of the A-76 process?

E. SCOPE

The scope of this thesis provides an objective assessment to DoD, as to whether the A-76 outsourcing

process is effectively working as it was originally designed. The scope of the study includes:

1. A review of the history and regulations regarding the evolution of the A-76 process;
2. An examination of the different steps of the A-76 process;
3. Presentation of issues and concerns associated with the A-76 process;
4. An in-depth analysis of the decisions made by the GAO with regard to protests involving A-76;
5. An analysis of changes that are needed to mitigate the risk of A-76 related protests; and
6. An analysis of the strengths and weaknesses of the A-76 process.

The thesis concludes with relevant suggestions and recommendations to improve the design and application of the A-76 process.

F. METHODOLOGY

The methodology used in this thesis research consists of the following steps.

1. Conduct a comprehensive literature search of books, magazine articles, CD ROM Systems, Department of Defense (DoD) directives, Government reports, Internet-based materials and other library information resources.
2. Conduct a search of the GAO database for protest cases that involved A-76 as an element of the protest filed since January 1, 1997 through December 31, 2001.

3. Identify trends or key elements that will allow the cases to be categorized and analyzed.

G. ASSUMPTIONS AND LIMITATIONS

This thesis is limited to protests that involve the A-76 process as an element of the protest that have occurred from January 1, 1997 to December 31, 2001. The primary assumption in this study is that the reader is familiar with the basic Federal acquisition contracting process.

H. DEFINITIONS

As previously stated in the assumptions, the reader(s) of this thesis should have a basic knowledge of the Federal acquisition contracting process, however, there are a number of different key terms that are frequently used synonymously throughout the Acquisition workforce that need to be clearly defined. In order to alleviate any possible misinterpretation and to establish a common reference point for how these key terms are used throughout this thesis, general working definitions are presented below.

1. A-76 Process

The Term "A-76 process", as it is used throughout this thesis, refers directly to the application of the entire mechanistic process outlined in the Office of Management and Budget (OMB) Circular A-76 and its subsequent updates. The A-76 process includes a series of steps, which are outlined in the next chapter. The "A-76 process" and "cost comparison" are used synonymously throughout the entirety of this thesis.

2. Outsourcing

The term "outsourcing" is often synonymously used in place of the term "A-76 process". It is important to understand that outsourcing is not the A-76 process but one possible outcome of it. The working definition of "outsourcing" used throughout this thesis is, "The transfer of a function previously performed in house to an outside provider." [Ref. 2] The essence of the definition is a contractual agreement between the customer and one or more suppliers to provide services or processes that the customer is currently providing internally.

3. Competitive Sourcing

"Competitive sourcing" is the process whereby the cost of Government performance of a commercial activity is formally compared to the cost of performance of commercial sources. In contrast, outsourcing is the contracting of the commercial activity.

4. Privatization

"Privatization" and "outsourcing" are two uniquely different terms. Privatization is, "a process of changing a public entity or enterprise to private control and ownership". Outsourcing specifically relates to the transfer of a function but not the full responsibility of the recurring services or functions. The A-76 process in most instances deals with the idea of outsourcing and privatization. [Ref. 2]

5. Commercial Activity

"Commercial activity" is an activity whose core functions include a process resulting in a product or service that is, or could be, obtained from a private sector source. Government agencies' missions may be accomplished through commercial facilities and resources, through Government facilities and resources, or through a mix of both of these, depending upon the products and services needed and the agency missions involved. [Ref. 26] Only activities defined as commercial activities are candidates for outsourcing.

6. Strategic Sourcing

"Strategic sourcing" is another term often misinterpreted as the A-76 process, privatization or outsourcing. For the purpose of this thesis "strategic sourcing" will be defined as, "the approach used to reduce the total cost of providing infrastructure by conducting a comprehensive review of a business unit or units considering a wide range of options including consolidation, restructuring, privatization, make or buy decisions, adopting better management practices, development of joint venture with the private sector, asset sale, and the termination of obsolete services or programs". [Ref. 2]

7. Interested Party

An "interested party" for the purposes of filing a protest means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. [Ref. 6]

8. Protest

A "protest" means a written objection by an interested party to any of the following: (1) a solicitation or other request by an agency for offers for a contract for the procurement of property or services, (2) the cancellation of the solicitation or other request, (3) an award or proposed award of the contract, and (4) a termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. [Ref. 6]

I. ORGANIZATION OF THIS THESIS

Following this introductory chapter, Chapter II provides a brief background on the evolution of OMB A-76 and the A-76 process. It discusses the design and procedures used when completing an A-76 study; it reviews the intended gains the process is designed to achieve; and finally, it provides a review of A-76 issues that often unintentionally surface at a command when conducting an A-76 study.

Chapter III provides a brief description of the protest process and addresses protests made to the GAO where A-76 was an element of the protest. The protests are broken down into sustained and denied categories and case principles are identified.

Chapter IV documents the GAO's protest decisions, and interpretations of the statutory requirements are analyzed in terms of current procurement policies to determine if acquisition professionals are applying the A-76 process

correctly. This chapter also examines circumstances likely to draw a protest.

Chapter V provides conclusions, recommendations, answers to the research questions and includes suggested areas for further research.

II. OMB CIRCULAR A-76

A. PURPOSE OF OMB CIRCULAR A-76

The primary purpose of OMB Circular A-76 is to set forth the procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel. [Ref. 17]

The A-76 process is one part of an entire suite of efficiency-oriented defense reform initiatives that DoD has implemented. This initiative is designed to generate savings that can be used for modernization, improving readiness, improving war fighter support and improving quality of life. The A-76 process has evolved into a thorough analytical effort aimed at maximizing the efficient use of scarce Government resources.

B. BACKGROUND AND HISTORY OF OMB A-76

As the first chapter stated, the origins of the A-76 process date back to the Eisenhower Administration in 1955 with Budget Bulletin 55-4, which stated: "It is the general policy of the Federal Government that it will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels." [Ref. 4] However, it was not until March of 1966 when the Office of Management and Budget (OMB) released OMB Circular A-76, "Performance of Commercial Activities", that this policy was officially formalized.

The original A-76 circular's basic principle was clear-cut, the Government was to rely on the private sector

for the products and services the Government needed. The circular stated that a Government commercial activity could provide goods or services only under one of the following circumstances:

- a. Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program.
- b. It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retaining of military personnel or to maintain or strengthen mobilization readiness.
- c. A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed.
- d. The product or service is available from another Federal agency.
- e. Procurement of the product or service from a commercial source will result in a higher cost to the Government.

The objective of the circular was to leave very little room for interpretation. The policy guidance was to require the Government to use the private sector when obtaining goods or services and only if exceptional circumstances come about, provide the services from within.
[Ref. 1]

The original A-76 circular went through several revisions and added a supplement to respond to critic's comments, to grow with a continually changing U.S.

political system and in general simplify the complex process. The first revision occurred in 1967. This revision focused on providing formal guidance for cost comparison procedure determinations. This was the only substantive change made in the 1967 revision.

The circular remained untouched until March of 1979, when a new version was released. The 1979 revision defined specific steps to be taken when determining whether an agency must contract out. This revision was the first to take steps to spell out a specific process when conducting A-76 studies.

In 1983, after a two-year analysis of the A-76 circular by the OMB staff, a major revision was released. This revision was designed to clarify procedures, streamline methodology and enhance equity in the process. This revision included the circular's first supplemental handbook, which outlined specific guidelines, when applying the A-76 process. Three fundamental principles that are endorsed as the three primary goals of the policy today were readdressed in this revision:

- 1) Achieve economy and enhance productivity (through increased competition),
- 2) Keep Government functions "in-house" (leave inherently Governmental functions untouched),
- 3) And rely on the commercial sector for products and services, but only if more economical. [Ref. 7]

This Supplemental Handbook set forth specific procedures for determining whether commercial activities

should be performed in-house using Government facilities and personnel.

The supplemental handbook saw its first revision in March of 1996. This revision to the supplemental handbook provided updated guidance and procedures for determining whether recurring commercial activities should be operated under contract with commercial sources, in-house using Government facilities and personnel, or through interservice support agreements. The supplement emphasized the point that Circular A-76 was not designed to simply contract out. Rather, it is designed to:

- 1) Balance the interests of the parties to a make or buy cost comparison,
- 2) Provide a level playing field between public and private offerors to a competition, and
- 3) Encourage competition and choice in the management and performance of commercial activities. [Ref. 18.]

This revision of the supplemental handbook introduced, for the first time, the requirement to compete for new or expanded reimbursable work based on an A-76 cost comparison.

Although the original A-76 Circular and all of its subsequent revisions provided written policy and guidance on how to conduct an A-76 study, there had always been one major question left unanswered. The circular failed to specifically address the area of when and what should be contracted out. The original circular provided definitions for what an inherently Governmental function was, but did not spell out the process or requirement for identifying

the activities that were not inherently Governmental. In 1999, the Circular went through another revision that established Federal policy regarding the performance of commercial activities and implementation of the statutory requirements of the Federal Activities Inventory Reform Act (FAIR) of 1998, Public Law 105-270. The implementation of the FAIR Act in the A-76 process made it a requirement for agencies to list those activities that are not inherently Governmental with OMB. In essence, this revision added missing teeth to the A-76 Process.

OMB Circular A-76 has matured immensely over the past 35 years. With continued solid support from the Government officials who write the circular's language, it will continue to evolve into a process that can be used effectively by procurement officials to ensure that the Federal Government is not competing with the private sector for goods or services than can be obtained through the commercial market.

C. HOW THE A-76 PROCESS WORKS

The A-76 Process is a comprehensive 12 step process (see Figure 2.1) that should take no longer than 24 to 48 months depending on the type of A-76 study being conducted. A provision in the National Defense Authorization Act delineated the 24-month requirement for a single-function cost comparison and 48-month requirement for a multifunction cost comparison. The public announcement in Step 2 starts the timeline and the tentative cost comparison decision in Step 9 ends the process.

A-76 Twelve Step Process
Step 1-Identification and Packaging of Commercial Activity
Step 2-Formation of A-76 Study Team and Public Announcement of Study
Step 3-Begin Acquisition Actions (Primarily create PWS and QASP)
Step 4-Preparation and Issuance of Solicitation
Step 5-Creation of Government Management Plan (MEO, IHCE, TPP, TP)
Step 6-Independent Review
Step 7-Neogtiation Phase
Step 8-Selection of Single Contractor that will compete with MEO
Step 9-Tenative Decision between MEO and Contractor Bid
Step 10-Adminstrative Appeals Process
Step 11-Implement MEO
Step 12-Post A-76 Actions

Figure 2.1 A-76 Step-By-Step Process

The first step in the A-76 process is the identification and packaging of the commercial activities intended to be studied. The implementation of the FAIR Act into OMB Circular A-76 has assisted activities in this step by requiring them to identify and report a list of all their commercial activities to OMB on an annual basis. Once the commercial activities are identified, they are organized into business units that would be most suitable for competition. "The effective packaging is the critical first step that ensures competition will be maximized during the cost comparison process." [Ref. 26] This step is completed prior to the releasing of the public announcement that starts the timeline for the study.

Once the packaging step is completed the commercial activity plan for the A-76 Study is created. Multiple actions occur simultaneously during this step, the A-76 Study Team is formed, which in turn develops the action plan for the study. Almost immediately upon the completion of the plan, the public announcement of the A-76 study is

officially made. Congress is the first group notified in the process, followed by an announcement to the local work force and the local community. The Installation Commander is responsible for making the formal notification to the workers who will be directly affected. The leader of the A-76 Study Team should be present to assist the Installation Commander in answering questions.

The Unit Commander and A-76 Study Team will be required throughout the cost comparison study to elicit participation from the workers. It is imperative at this point that the entire process be explained to the workers. By explaining the process, they will be able to garner more assistance and help reduce some of the anxiety and fear the employees may be feeling. A major key to the success of any A-76 study is constant communication between the A-76 study team and the employees being affected.

After the study has been officially announced to the public, step three begins with the first acquisition actions being initiated. In this step, the Contracting Officer begins to play a critical role in the A-76 process. He is responsible for integrating the FAR requirements with the OMB and DOD rules. He assists in the development of the Performance Work Statement (PWS), the Quality Assurance Surveillance Plan (QASP), the preparation and issuance of the solicitation and conducting negotiations prior to the cost comparison. He is specifically responsible for preparing and/or issuing a Commerce Business Daily (CBD) notice, market survey, and Independent Government Estimate, as well as facilitating the source selection process and ultimately monitoring the performance of the selected

service provider after the implementation. The crucial two pieces of this step include the development of the PWS and the QASP.

The PWS, also referred to as the statement of work (SOW) or requirements document, is the document that describes the work to be performed including the definitions of results or outcomes derived from the commercial activity. The PWS is the description of what the Government intends to buy, regardless of the outcome of the cost comparison. It ultimately becomes Section C, which is the technical performance section of the Request for Proposal (RFP) that is issued by the Contracting Officer. The development of the PWS is one of the most difficult, time consuming and critical pieces in the A-76 process. The Contractor and the Government's in-house organization develop their respective offers to perform the work requirements based on the PWS. If the right amount of time and effort is not given by the right qualified personnel during the creation of the PWS, the entire A-76 study can ultimately fail.

The QASP is best defined as the mechanism used to implement the inspection and acceptance clauses outlined in the FAR. It describes methods of inspection, required reports, and resources to be used including estimated work hours; it purposely focuses on the quality of the products and or services received rather than the procedures used to provide them. The creation of the QASP describes the procedures the Government will use to ensure that the actual performance of a successful contractor's proposal

meets the requirements of the PWS, if the commercial activity is outsourced as a resort of the A-76 study.

The QASP also provides the procedures for the Post-Most Efficient Organization Performance Review, which is an evaluation of the in-house organization's performance if the A-76 study results in keeping the commercial activity in-house. When writing the QASP, the cost comparison team has to be careful not write too many metrics into the plan. Too many metrics and overly intrusive oversight can result in costly monitoring expenses and upsets contractors or Government employees. Upon completion of the PWS and QASP, the two documents go through an official review and approval process.

The fourth step in the process is the preparation and issuance of the solicitation document. This includes determining the appropriate contract type, creating the source selection plan, developing evaluation criteria, developing the Independent Cost Estimate and then preparing and releasing the solicitation. During this step, the Government identifies methods of conducting interaction with private industry and potential offerors prior to issuance of the solicitation.

There are various unique requirements that need to be included in the solicitation package. The contractor must be notified that the final award is based solely on a cost comparison between the apparent successful commercial bidder and the Government's in-house cost estimate. If the Government's in-house estimate is found to be more economical, the commercial activity will not be outsourced to the contractor. The solicitation document must include

the Right of First Refusal of Employment clause, which ensures that Federal employees whose positions are eliminated if an activity is outsourced will be given priority for employment with the winning contractor. The Contracting Officer and the A-76 Study Team work together throughout this step in order to ensure eventual success of the A-76 Study.

Step number five is considered the other most critical step in the A-76 process. In this step, the Government creates a management plan, which is made up of four key documents, the Most Efficient Organization (MEO), the In-house Cost Estimate (IHCE), the Technical Performance Plan (TPP) and the Transition Plan (TP). The Management Plan is the in-house organization's proposal for how it will perform the commercial activity. It describes how the current organization will be structured or restructured, staffed and the operating procedures to be followed in performing the requirements of the PWS. This is the step in the A-76 process where any new and potentially long-term efficiencies in the way business is currently being done can be achieved.

The MEO is the document that is intended to reflect the Government's MEO that meets the requirements outlined in the PWS. The MEO should identify the organizational structures, staffing and operating procedures upon which the Government's offer is based. The development of the MEO requires input from all levels of the organization including analysts, functional managers and supervisors. This is why constant communication between the A-76 Study Team and the employees is so important throughout the

process. The Activities' Human Resources Office can be used as a key resource when developing the MEO.

The IHCE is the part of the Government's management plan that is supposed to provide a description of all costs associated with the performance of the MEO and any assets that are not provided to the contract but that will be used by the MEO. The cost estimates created from the MEO are the costs used in the final Cost Comparison. It is important to note that the IHCE should not be confused with the term Independent Government Estimate (IGE), which is an estimate of the costs and profit to perform the work described in a PWS that is used in evaluation of contract offer. The IGE is developed by the contracting office and used to decide if contract offers are fair and reasonable. The IHCE is based solely on the information found in the MEO, therefore, if the MEO is written incorrectly the IHCE will not be effective.

The TPP and TP are the two different documents written during the creation of the Government's Management Plan that lay out the plan of how the Government will implement the MEO after the study has been completed. The TPP gives the details on how the Government will perform the PWS if the A-76 study results in the selection of the MEO and the TP outlines the steps the Government will take if the commercial activity is outsourced.

After the Government's Management Plan is created, the process moves into step six which is the Independent Review. During this step the PWS, QASP, MEO, IHCE, TPP and TP are all reviewed by the Independent Review Officer (IRO). The IRO is the agency official responsible for

certifying that the actions laid out and data contained in these six documents reasonably establish the Government's capability to perform the PWS within the resources made available by the MEO and to make certain that all costs in the IHCE are fully defensible. The IRO should be an individual who has not been a member of the MEO Team and who possesses the requisite knowledge to accurately judge the cost effectiveness and efficiency of the new organization.

After the completion of the Independent Review, changes can be made to the Government Management Plan up to the closing date for proposals to be received in response to the RFP. Any changes made to any of the Government's management plan must be certified by the IRO prior to the receipt of the contract offers. During this step, the IRO is responsible for ensuring the Government's management plan has been written in accordance with the requirements outline in OMB Circular A-76 and its Supplemental Handbook.

In Step 7, the Government has already received the contract proposals solicited from industry in Step 4. In this step the discussion process begins. The Contracting Officer holds either written or oral discussions with offerors to resolve any deficiencies in their respective technical and/or cost proposals. Any discussions held with the offerors must follow the rules outlined in the FAR. Each offeror should be given the same amount of time to make final revisions to their proposals that are then reevaluated by the technical evaluation panel.

Once industry has made their changes to their proposals, the Contracting Officer and his team then select

the single contractor that will compete with the MEO in the cost comparison. In this selection step, Step 8, the offeror's proposals are evaluated differently than they will be evaluated against the MEO. The selection of the single contractor will be based on "best value" vice the "cost comparison" method used in the next step. The expected outcome of the selection using "best value" is based on choosing the contractor that provides the greatest overall benefit to the Government in response to the solicitation.

In Step 9 the Government then begins the process of comparing the proposal that was selected in Step 8 with the Government's In-house offer. Before any selection or tentative decision is made, the Source Selection Authority (SSA) has to first make a determination that the Government's technical proposal will provide the same level of performance as the winning contractor's offer. If the Government's proposal is found deficient in any way, it is revised and the costs that will be compared in the cost comparison are recalculated. This evaluation is conducted to ensure that the two proposals will provide the same scope of work and level of performance.

Following the leveling process of the Government's in-house offer with the contractor's proposal and final approval of the two Technical performance plans by the SSA, the Contracting Officer then opens the Government and contractor cost proposals and begins the process of completing the cost comparison. A tentative decision is then made between the two proposals based on the cost comparison results.

It is important to note that the final selection between the two offers must be based upon lowest cost. This lowest cost decision is made taking into account a minimum cost differential requirement. This minimum cost differential requirement states that in order for the contractor's proposal to be selected it must be lower than the Government's proposal by the lesser of 10 percent of the personnel costs in the Government ICHE or \$10 million over the performance period. The purpose of the minimum cost differential is to avoid the disruption of converting performance of the commercial activity based on a minimal cost savings. The Contracting Officer then notifies the Installation Commander of the tentative decision prior to making the public announcement of the tentative decision.

Once the public announcement of the tentative decision is made, Step 10, the Public Review Period, begins. The Public Review Period normally ends 20 calendar days after the supporting documentation has been made publicly available. For particularly complex cost comparisons, the Contracting Officer can choose to extend this period up to a maximum of 30 calendar days. During this review period, administrative challenges to the cost comparison decision can be made based on asserted errors in the comparison process. To be considered an eligible appeal the issues raised have to meet the criteria established in the OMB Circular A-76 Revised Supplemental Handbook and be presented in writing to the Contracting Officer prior to the end of the Public Review Period.

Upon completion of the Public Review Period, one of two steps is taken (Step 11). If the final cost comparison

favours an in-house decision, the solicitation is cancelled and the MEO is implemented in accordance with the Government Management Plan. Conversely, if the contractor is awarded the contract, the process of implementing the Transition Plan outlined in the Government Management Plan begins.

In either case, when the MEO or the contractor takes over the existing current in-house operation, a number of different tasks must be completed. The transition plan is implemented, which may include a multitude of changes such as: the turnover of equipment, all personnel requirements, inventories, procedural changes and other changes that result from the transition. This transitional period is a critical time wherein special consideration must be given to support the personnel in the organization who are affected by the outcome of the study.

The final step in the A-76 process occurs upon the full completion of the transitional period. At this point, the new organization begins full performance of its duties and the Government implements the QASP. This QASP should be reviewed periodically. In the case where the Government MEO is implemented, a formal review and inspection of the MEO should be conducted somewhere close to the end of the first full year of performance. The Post-MEO confirms that the MEO has been implemented in accordance with the Government management plan. Finally, the conclusion of the A-76 process is to re-compete the function at the end of the "contract" performance period.

D. INTENDED BENEFITS OF THE A-76 PROCESS

Subjecting an activity to the A-76 process is intended to produce a number of positive benefits that should ultimately result in creating a stronger overall DoD. A number of the different likely benefits that result from the A-76 process include:

a) Introduction of Competition

Although there are a number of different intended benefits to be achieved by the introduction of the A-76 process, the principal reason to introduce it into an organization today is to try to draw out new efficiencies through competition. Dr. Paul Kaminski, former Under Secretary of Defense for Acquisition and Technology, explained this core benefit when he stated, "Competition drives best value, not simply outsourcing for the sake of outsourcing. If done correctly, outsourcing will not only save money, it will help DoD to be an organization that thrives on competition, innovation, responsiveness to changing needs, efficiency and reliability." [Ref. 8]

The A-76 process has the ability to introduce competition into the DoD where the Government normally operates as a monopolist and is consequently less efficient. The introduction of competition creates a number of positive outcomes that include greater efficiency, better service, more flexibility, better management focus and increased cost savings.

b) Increased Efficiencies

The A-76 process provides opportunities to increase efficiency within the organization. When the MEO is being

created, the Government has to take a serious look at how they are currently doing business. Their competition is public industry. If the Government does not take the competition seriously and does not start to look at more efficient ways to do business when they are creating the MEO, the commercial activity may be outsourced. Conversely, the contractors must find more efficient ways of performing the commercial activity if they want to be competitive. "The cost comparison and the competition itself compel both the Government and industry to become more efficient", together they drive the entire organization to improve. [Ref. 20]

c) Improved Customer Service

The new ideas and efficiencies the Government and the Contractors develop ultimately are passed onto the warfighter through improved processes. When a study results in outsourcing, the Government is able to take advantage of the opportunity of the efficiencies of the non-monopolistic market. Since the private sector is driven by the profit motive, the private sector can hypothetically be seen as more receptive to customer needs. "For DoD, competition can lead to more rapid delivery of better products and services to the warfighter, thereby increasing readiness". [Ref. 5]

d) Increased Flexibility

Flexibility is another intended benefit achieved by the A-76 process. The new organization created as a result of the A-76 study is re-competed at the end of the contract performance, which is usually every 3-5 years. This allows the organization to change if the environment it is

supporting changes. If the DoD grows or shrinks, the appropriate size and composition of the resources needed to complete the tasks associated with the commercial activity can be adjusted.

e) Better Management Focus

Another benefit garnered through the A-76 process is the increase in management focus. The size of many organizations in DoD has continued to grow with the growth of Government. In many cases, management is put in the position to spread its attention on areas of their organization that have nothing to do with the core mission of the organization. When these pieces of the organization are outsourced, the organization's leaders are able to focus more of their valuable attention on the core competencies of the organization. [Ref. 5]

f) Cost Savings

One of the primary goals of the introduction of competition in the A-76 process is cost savings. In general, most studies that have been completed over the past two decades show this to be the case. One study conducted by CNA Corporation, which looked at A-76 contracts competed by the DoD between 1978 and 1994, showed an average savings of 31 percent over the costs incurred before the A-76 review. [Ref. 9] Similar results were found in a GAO report, released in 2001, which stated, "Overall, DOD reported that the A-76 studies generated a savings of about \$290 million in fiscal year 1999 alone". [Ref. 25] These savings highlight the future potential of outsourcing. The bottom line is cost reductions are achieved whether the competitions are won by the public or

the private sector. Cost reductions result from the efforts set forth in the A-76 process, which has set its primary objective as the ability to achieve more efficient organizations. [Ref. 24]

As the examples above show, a number of the benefits that result from applying the A-76 process are a result of the competition created between the Government and private industry. These benefits will continue to be achieved regardless of whether the results of the A-76 study result in outsourcing or keeping the commercial activity in-house.

E. A-76 PROCESS CONCERNS

While there are several potential benefits related to the A-76 process, there are also different concerns and possible drawbacks. Specific concerns with the process include the following.

a) Perceived Unfair Competition

Competition can be a double-edged sword. Competition introduces a competitive environment that forces the government to achieve new efficiencies; however, if private industry perceives the competition as unfair or too intensive, it provides a negative incentive to those firms that might normally compete in an A-76 competition to stay out of the process. Dennis Wright pointed this out during a Commercial Activities Panel in June of 2001. He stated, "Today, the A-76 Commercial Activities program is not seen as a wise investment." He goes on to say that the competition is considered by many industry representatives as too fierce to make it a wise business decision. This is because the two-step process first requires competition between industry and then competition between the industry

winners with the MEO. The MEO has an unfair advantage of 10 percent or \$10 million price differential making the playing field uneven. The bottom line is the total process costs an average of \$750K for up to three years with an overall 12 percent probability of winning. Several companies in the industry do not see a 12 percent chance of winning as a good business decision. [Ref. 28]

In a May 2001 Contract Management article, Mr. Tim Whalen, The A-76 Situation: Worse, Not Better, made this figure of 12 percent look even more dismal when he wrote, "Today, people bidding A-76 contracts are winning 40 percent of the 25 percent of targets available, for a net 10 percent effective ratio". [Ref. 27] The concern in industry appears to be real. Some industry representatives believe the process is overly biased for the Government and if the process is not fixed the Government will ultimately suffer by not having industry's top companies to compete with.

b) Overstatement of Projected Savings

In more than one report, GAO has criticized DoD for their inaccuracies and flaws in their savings estimates from the A-76 process. In a March 1997 report, the GAO gave six reasons for the savings that are reported as not being reliable:

- 1) Savings estimates often represent projected rather than realized savings;
- 2) The costs of the competitions were not included;
- 3) Baseline cost estimates were lost over time;

- 4) Actual savings have not been tracked;
 - 5) Where audited, projected savings have not been achieved; and
 - 6) In some cases, work contracted out was more expensive than estimated before privatization.
- [Ref. 22]

This concern must be addressed. Government officials go through lengthy budgeting processes and often take into account the projected savings estimated in these programs when they design their budgets. If the projected savings are not achieved, shortfalls in other DoD programs will occur.

c) Organizational Issues

As was previously pointed out in the intended benefits area of this thesis, the A-76 process should be able to provide three benefits: increased flexibility, increased management focus and improved customer service. Although these benefits may be achieved after the completion of the study, during the actual process which, can last anywhere from 24 to 48 months, the organization can suffer through a decrease in all three of these areas.

The decrease in these three areas is a result of the decrease in morale the A-76 process creates. Flexibility goes away during the process because the study increases work for everyone in the organization. This ties directly into the decrease in management focus. Rather than being able to focus on the organization's primary mission, leadership's focus is forced to deal with the internal organizational issues that result from the study.

A number of different personnel issues come to the surface as a result of the process. People are generally unhappy and feel very uneasy; the world as they knew it is being changed by this process. The people being affected by the study may be forced to retire early, be put in the position where they have to work for the contractor for less money, they may have to switch jobs, or even fill a lower position once the MEO is put into place. Junior personnel run the chance of losing their jobs completely. This has the unintended effect of aggravating an aging work force problem the DoD is dealing with today. (DoD has an average workforce age that is ever increasing.)

One of the ultimate losers in this process may be the customer. The process takes a great amount of time and energy from everyone in the organization. When the focus of the organization shifts to personnel issues and A-76 study issues, less time and energy can be given to the customer. This potential pitfall must be addressed prior to starting the study.

The bottom line that has to be addressed when an A-76 study deals with organizational issues is that organizations are made up of people. In order for an organization to succeed, it must take care of those people. Dr. Randall Yim, Deputy Under Secretary of Defense for Installations, summed up this area of concern very well during a conference in February of 2000. He said, "The most difficult part is that we're not just talking about savings, we're talking about people's careers." [Ref. 19]

d) Destroying Government and Private Industry Relationships

One of the primary goals of the Defense Review Initiative (DRI) in 1997 was to improve the relationship between Government and private industry. The introduction of the A-76 process has unintentionally created the opposite effect. The process creates an "Us vs. Them atmosphere." During recent Congressional Testimony, the following statement was made by Dr. Charles Mather, a Professor from the University of Baltimore Law School, "Unfortunately, while we were beginning to see more partnering and cooperative relationships between Government agencies and their contractors, the push for public-private competition using the OMB Circular A-76 process has revived the "us versus them" environment". [Ref. 10]

This "Us vs. Them" relationship problem stems from Government employees fearing losing their jobs. The A-76 process, which is often considered as a "win" or "lose" proposition rather than a "keep in-house" or "contracting out" process creates two, opposing sides. The contractor wants the business while the Government employees would like to keep their jobs. When the contractor calls for information on how the process is currently being completed, no one from the Government side wants to talk. Even if the process is meant to be in the best interest of the Government, the employees whose positions are being competed do not have the same understanding. This concern is based in basic human nature and may never be successfully addressed.

F. SUMMARY

In this chapter, the researcher provided a detailed description of the purpose and background of the OMB Circular A-76 process. The introduction of competition into Government activities was introduced and discussed through the thorough description of the 12 Step A-76 process. The chapter ended by discussing both the intended benefits and unintended concerns that result from the implementation of the process. By clearly understanding the entire background of the A-76 process, the reader will better understand why protests are made to the General Accounting Office, which is discussed in the next chapter.

The next chapter looks at the protest process and how the Comptroller General has dealt with A-76 protests. These protests have increased as a result of increased number of A-76 studies under the Defense Review Initiative in 1997. It also provides a list of the remedies available to the Comptroller General and a breakdown of some of the common grounds for protests. Finally, it identifies case principles from both sustained and denied A-76 protests.

III. A-76 RELATED PROTESTS

A. INTRODUCTION

This chapter begins with a comprehensive overview of the GAO Comptroller General bid protest process. It then reports the total number of GAO bid protests that were filed with the GAO from January 01, 1997 to December 31, 2001 and then breaks out the total number of A-76 related GAO protests covering this same period. The A-76 protests are presented in three separate categories: dismissed, sustained and denied. The case principles of each category are identified and presented in their respective categories. The sustained category includes actual GAO protests that are representative of the key principles that are identified. The data presented in this chapter is then analyzed in depth in Chapter IV.

B. THE GAO BID PROTEST PROCESS

GAO 5 Step Bid Protest Process
Step 1-Interested Party Files Claim
Step 2-Notification of/Response to Protest made by the Contracting Officer
Step 3-Protest is either Dismissed or Identified as a Merit Protest
Step 4-GAO reviews the protest and makes its Decision
Step 5-Agency takes action on the GAO's Decision

Figure 3.1 GAO Five Step Bid Protest Process

The following section presents a detailed explanation of the GAO bid protest process as it is described in the General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts 4

CFR Part 21, effective date August 8, 1996 and the 1999 Government Contract Law Course Text. [Ref. 3 and Ref 21] The GAO bid protest process is complex and consists of five distinctive steps (see Figure 3.1).

The first step begins when an interested party files a written protest with the GAO. The interested party may submit a protest on various types of solicitations for a number of different reasons, which include:

- 1) Protest a contract for the procurement of property or services;
- 2) Protest the cancellation of a solicitation;
- 3) Protest an award or proposed award of a contract; and
- 4) Protest the termination of a contract, if that termination was based on improprieties in the award of the contract.

To be considered timely, the protest must be filed no later than 10 calendar days after the basis for the protest is known or should have been known. Where the protest is challenging a procurement conducted on the basis of a competitive proposal, which includes a mandate for a debrief, the protest shall be filed no later than 10 calendar days after the date on which the debriefing is held.

The written protest must include the following details:

- 1) The name, address, and telephone and facsimile number of the protester;
- 2) Be signed by the protestor or its representative;

- 3) Identify the contracting Agency and the solicitation and/or contract number;
- 4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents;
- 5) Set forth all information establishing the timeliness of the protest;
- 6) Specifically request a ruling by the Comptroller General of the United States; and
- 7) State the form of relief requested.

Failure to follow any of the guidelines outlined in this step may result in the dismissal of the protest by the GAO.

The second step requires the protestor to notify the Contracting Officer, or the location designated by the contracting Agency, that a protest has been filed with the GAO. The protestor must make this notification within one calendar day of filing the protest. The notification should include a complete copy of the protest and all attachments. The GAO is also required to notify the Agency within one calendar day of receiving the protest.

Once the Contracting Officer receives notification of a protest, he is required to notify all other interested parties, including the otherwise successful awardee within three calendar days. The procurement action should be automatically suspended when the protest is received. However, under specific circumstances the Government can withhold the immediate suspension of the procurement action. Following the guidelines outlined in The

Competition in Contracting Act (CICA) of 1984, the contracting Agency can override the suspension of the procurement action if the performance of the contract is in the best interest of the Government or if there are justifiably "urgent and compelling circumstances". If a protestor fails to notify the Contracting Officer, the GAO can dismiss the protest.

The Contracting Officer is then required to file an Agency report, responding to the protest within 30 calendar days. A copy of the report must be provided to the protester. This Agency report should include the Contracting Officer's statement of the relevant facts, a best estimate of the contract value, a memorandum of law, and a list of all other applicable documents. The protestor is then given ten calendar days to file a response to the Agency's report.

In the third step, the GAO takes one of two actions, either it dismisses the protest due to procedural error or substantive defects, or it deems a protest a "merit protest" at which point it will then go through the GAO review process. It is important to note that the protest can be dismissed by the GAO prior to or any time during step two of this process. The GAO then has 100 calendar days to review the merit protest and make a decision.

During the review process, the GAO may schedule informal meetings or conferences to discuss and resolve procedural matters and to gather additional information pertaining to the disposition of the protest. Hearings can also be conducted to decide factual and legal issues raised during the protest process.

Upon completion of their review, the GAO makes a decision. The protest is either denied or sustained. If the protest is sustained, the Comptroller General can recommend that the contracting Agency implement any combination of the following remedies:

- 1) Terminate the contract;
- 2) Refrain from exercising options under the contract;
- 3) Re-compete the contract;
- 4) Issue a new solicitation;
- 5) Award a contract consistent with statute and regulation; or
- 6) Such other recommendations that GAO determines necessary to promote compliance.

In all cases, except when the decision contains protected information, a copy will be provided to the protestor, the head of the contracting Activity involved, the senior procurement executive of the Federal Agency involved, and a copy shall be made available to the general public. Any decision offered may also include a recommendation that the Agency reimburse the protesting contractor for its protest costs, including the costs of consultants and expert witnesses.

Once a GAO protest decision is passed down, the final step of the bid process is initiated. The procurement action is released from suspension, allowing the affected Federal Agency to accept or reject the GAO's non-binding advisory recommendation. Whereas most GAO recommendations are followed, the GAO does not have the authority to force its decisions upon agencies of the Executive Branch.

However, the Federal Agency should be aware that the GAO reports all instances of non-compliance to Congress in an annual report.

C. TOTAL GAO AND A-76 PROTEST BREAKOUTS

A comprehensive review and compilation of the protests reviewed by the GAO from January 01, 1997 to December 31, 2001 was conducted by downloading and individually reviewing approximately 2100 GAO documents from the GAO website. (Ref GAO Website) The protests were reviewed and then assembled into relevant categories to be used for in-depth analysis.

The total number of bid protests that were filed with the GAO between January 1, 1997 and December 31, 2001 was 1836. Of the 1836 protests, forty-nine were related to the A-76 process. GAO dismissed ninety of the 1836 protests (four A-76 related protest) for failing to meet various requirements spelled out in the GAO Bid protest process. During this segregation step, the ninety dismissed protests were removed from the general group of protests leaving 1750 merit protests. Forty-five of the 1750 merit protests were A-76 related. The merit protests were then catalogued by calendar year into sustained or denied categories.

The next step in the grouping process consisted of separating the A-76 related protest from the rest of the GAO protests. This breakout pile was used to develop the detailed analysis in this thesis. After this separation step was completed, the data was compiled into several tables. The A-76 data is presented throughout the rest of this chapter and then analyzed in Chapter IV. A complete

breakdown of the total protest numbers is presented by year and category in Table 3.1.

Total A-76 & GAO Bid Protest Statistics Calendar Year 1999-2001						
		A-76		GAO		
Total Protests		49		1836		
Merit Protests		45		1750		
Sustained Protests		23		307		
Denied Protests		22		1443		
Dismissed Protests		4		86		
GAO Bid Protest Statistics (Calendar Year)						
	1997	1998	1999	2000	2001	Total
Merit Protests	456	417	332	274	271	1750
Sustained Protests	68	65	67	55	52	307
Denied Protests	388	352	265	219	219	1443
Dismissed Protests	51	17	5	7	6	86
A-76 Related Bid Protest Statistics (Calendar Year)						
	1997	1998	1999	2000	2001	Total
Merit Protests	1	4	10	8	22	45
Sustained Protests	0	0	7	5	11	23
Denied Protests	1	4	3	3	11	22
Dismissed Protests	0	1	0	1	2	4

Table 3.1 Total GAO Bid Protest Statistics 1997-2001

The data compiled in Table 3.1 is used in Chapter IV to make comparisons between the total GAO protests and A-76 related protests. Comparisons are made between yearly and five year total sustainment rates, and the trends between increases/decreases of total protests. The reasons for the differences between the sustainment rates and trends are also discussed.

D. DISMISSED A-76 RELATED PROTESTS BREAKOUT

Four of the forty-nine A-76 related protests that were brought before the GAO were dismissed. As discussed earlier when describing the GAO Bid Protest Process, a protest can be dismissed for a number of different reasons.

The four A-76 related protests that were dismissed fell into three different categories:

- 1) Dismissal for failure to be timely;
- 2) Dismissal for premature filing of the protest; and
- 3) Dismissal for not meeting the requirements of being an "interested party".

The breakout of the dismissed protests is illustrated in Figure 3.2.

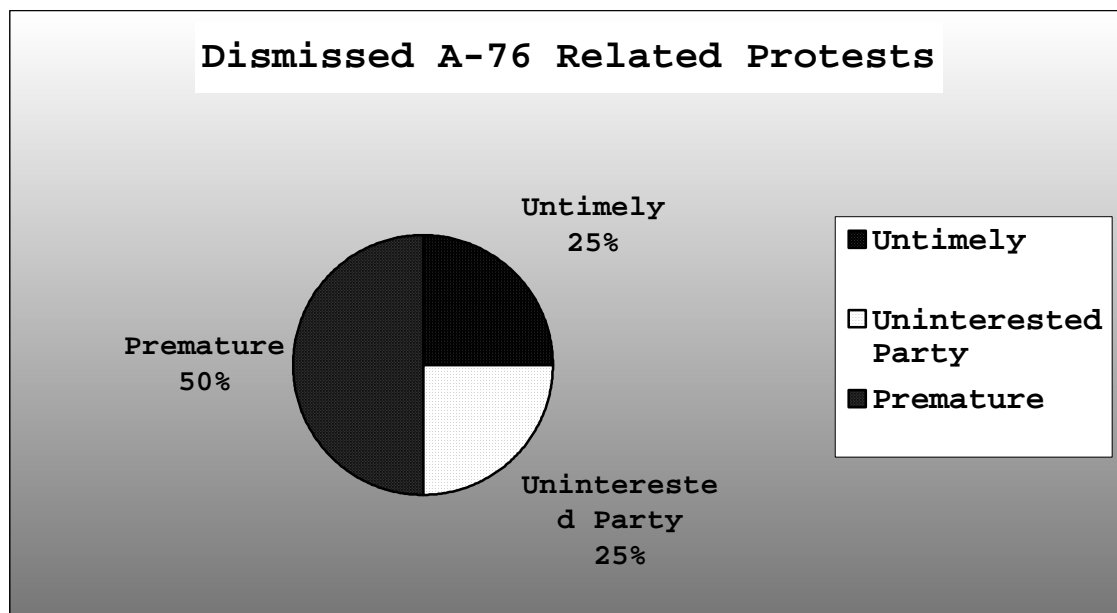


Figure 3.2 Dismissed A-76 Related Protest Breakout

The two premature protest dismissals resulted from the protestor's failure to allow the A-76 appeals process to run its course. In the untimely protest dismissal, the protestor simply failed to file the protest within the 10-calendar day rule mandated by the GAO Bid protest process. The fourth A-76 related protest was dismissed because the protestors filing the protest were not considered to be

interested parties eligible to maintain a protest. A more robust analysis of the four dismissals is presented in Chapter IV.

E. DENIED A-76 RELATED PROTEST BREAKOUT

As Table 3.1 shows, twenty-two of the forty-five A-76 related merit protests were denied. Unlike the A-76 protests that were dismissed, none of the denied protests reviewed and listed in Appendix A fit any specifically identifiable categories. The denied protests were levied for a variety of different reasons to include:

- 1) Professed that the Government failed to include a FAR clause "Indemnification Under Public Law 85-804";
- 2) Professed that the Government conducted unequal technical discussions;
- 3) Requested that the Government reimburse the costs incurred in pursuing an administrative appeal;
- 4) Request for a recommendation that the Government reimburse the cost of filing an earlier protest challenging a cost comparison;
- 5) Protested the proposed action taken by a Government Agency to correct areas of organizational conflicts of interest;
- 6) Protested the Governments alleged failure to meet the solicitation requirements;
- 7) Made the accusation that the Government failed to apply the stated evaluation factors;
- 8) Argued that the Government's Cost Comparison failed to directly compare all positions identified in the MEO;

- 9) Protested the Government's use of in-house auditors as procedurally improper;
- 10) Alleged that the Government improperly cancelled the solicitation and then reinitiated the A-76 Cost Comparison;
- 11) Protested the Government's rejection of a proposal as technically unacceptable and possible Conflict of Interest;
- 12) Protested the ISO 9000 requirement in a solicitation as being inappropriate selection criteria;
- 13) Challenged the Government's final decision after the Cost Comparison was completed;
- 14) Protested the evaluation method used by the Government;
- 15) Protested that the Government stated proposal was evaluated against unstated criteria;
- 16) Argued that the Government failed to seal its Management Plan/MEO in accordance with A-76 process guidelines;
- 17) Protested that the Government failed to use correct figures in the cost comparison;
- 18) Protested that the Government improperly evaluated the proposal and source selection decision were improper;
- 19) Protested that the Government conducted prejudicially unequal and misleading discussions with the firm;
- 20) Protested that the Government evaluation of the technical proposal was unreasonable;

21)Protest that the Government improperly "gamed" the cost comparison; and

22)Protested that the Government's review procedures were biased.

Even though all twenty-two protests were denied, there are still lessons to be learned from them. In a few very similar cases, the protestors' positions have been sustained. The similarities between the denied and sustained cases and the lessons that can be learned from the cases are discussed in Chapter IV.

F. SUSTAINED A-76 RELATED PROTEST BREAKOUTS

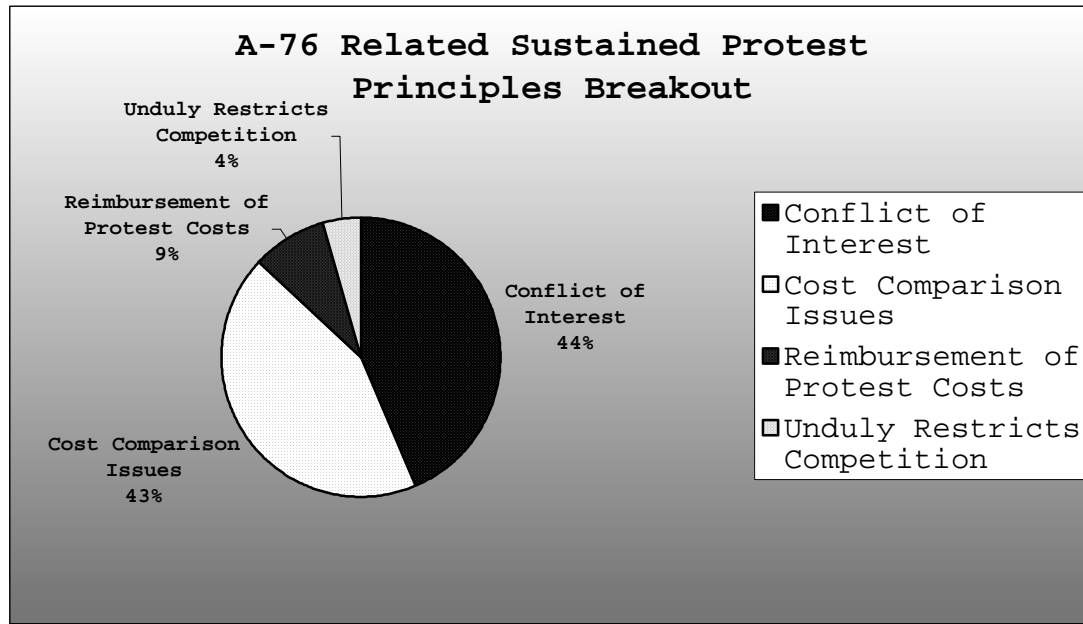


Figure 3.3 Sustained Protest Issue Breakout

The GAO sustained the remaining twenty-three A-76 related protests that were determined to be protests with merit. Figure 3.3 was developed from a review of the twenty-three sustained protest cases. Unlike the denied protests, the sustained protests' case principles fell into specific identifiable categories. Of the twenty-three

protests that were sustained: ten dealt with issues related to conflicts of interest; ten were related to cost comparison issues; two requested reimbursement of protest costs; and one was associated with unduly restrictive competition. The protests that were sustained because of cost comparison issues broke down further into two supplementary categories, best-value leveling/in-house cost estimate problems and improper reversal of initial cost comparison issues.

In the remaining part of this section, five of the sustained protests that represent each of the four main categories and the two cost comparison categories that were identified above are presented. A case number and date identify each case and then the protestor's position is briefly reviewed. Next, the thought process and principle the GAO relied upon to sustain the protest is presented. Finally, in a few of the cases, the Government Agency's arguments of their position are briefly reviewed.

1. Unduly Restricts Competition

Matter of BMAR & Associates, INC., B-281664, March 18, 1999

In this case the protestor's (BMAR and Associates, Inc.) principal argument was that the technical proposals (RFTP) issued by the Government Agency for civil engineering services at the base waste water treatment plant operation did not contain sufficient data on which to base a bid for civil engineer tasks and functions. The protestor specifically pointed out that the RFTP did not contain historical data regarding the scope or the frequency of the service calls that were required by the

Government Agency in the past for the same type of work or any detailed estimate of the projected future work.

BMAR went on to argue that the requirement to submit a lump sum bid on an "ill-defined" RFTP, which required multiple "non-personal services" including the provision of personnel, equipment, tools, material, vehicles, supervision and other items necessary to perform civil engineering services, ultimately imposed an unjustifiable amount of risk on them. The GAO sustained the protest on the principle that:

In sum, since the lump sum pricing scheme may not result in the lowest possible cost to the government; subjects the contractor to inordinate risk; and puts offers at a competitive disadvantage versus the government in the cost comparison process, it is unreasonable, and as such is inconsistent with the statutory requirement for full and open competition. [Ref. 11]

The Government Agency stated that it released various documents containing the data needed to create a competitive proposal; they also stated that they provided access to a computer terminal that allowed offerors the opportunity to gather the information on current work orders needed to complete their proposal. GAO concluded that the Agency did not adequately justify the inordinate risks to the contractor arising from the lump-sum pricing approach resulting in the creation of unduly restrictive competition.

2. Request for Reimbursement of Filing and Pursuing the Protest

Matter of: The Jones/Hill Joint Venture—Costs, B-286194.3, March 27, 2001

In this case the protestor (Jones/Hill Joint Venture) made the argument that it should be reimbursed the costs of filing and pursuing an earlier protest challenging the Government Agency's determination to keep services in-house vice contracting out the activities to the protestor. (The specific details of the previous protest are not required to be described in the abridgment of this protest.) After both sides provided their appropriate responses to the original protest, the Government Agency requested that a GAO attorney be assigned to an Alternative Dispute Resolution (ADR) conference to assist in coming to an equitable resolution of the protest issues.

At the conclusion of the ADR, the GAO attorney informed both parties that in his view the Government Agency faced significant litigation risk regarding its determination in the cost comparison. The Agency notified the GAO that it would take corrective action in response to the protest. Because the Government Agency made the assertion that it intended to take the corrective action outlined in the ADR, the GAO dismissed the protest as academic. Approximately six months after the original protest was filed, Jones/Hills filed this protest arguing that the Navy had unduly delayed taking corrective in response to what GAO had considered a clearly meritorious protest. The Comptroller General sustained the protest on the principle that:

When a procuring Agency takes corrective action in response to a protest, our Office may recommend that the Agency reimburse the protestor its costs where, based upon the circumstances of the case, we determine that the Agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protestor to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. A protest is clearly meritorious when a reasonable Agency inquiry into the protest allegations would show facts disclosing the absence of defensible legal position. [Ref. 15]

In its response to this protest, the Government Agency essentially ignored the ADR conference outcome. It chose to take piecemeal corrective action and argued that the majority of the protestor's points made in the first protest were outside the requirements outlined in the OMB A-76 Supplemental Handbook; therefore, the protest should not be considered meritorious. The GAO disagreed with this line of argument resulting in the sustainment of Jones/Hill's protest.

3. Conflict of Interest

Matter of DZS/Baker LLC; Morrison Knudsen Corporation B-281224, B-2821224.2, B-2821224.3, B-2821224.4, B-2821224.5, B-2821224.6, January 12, 1999

In this case the protestors (DZS/Baker LLC; Morrison Knudsen Corporation) argued that the Government Agency made two grievous errors when making a determination that the two technical proposals received by the Government in an A-76 study were found to be severely deficient and therefore technically unacceptable. This decision by the evaluation team resulted in a cancellation of the solicitation and implementation of the MEO. The protestors

argued that the Agency's cancellation of the solicitation was a result of the Government's failure to conduct meaningful discussions and unreasonable evaluations of the technical proposals, which stemmed from the evaluators' inability to make an impartial evaluation because of improper conflict of interest. The conflict of interest position was that fourteen of the sixteen evaluators (four of the six core evaluators) held positions that were under study as a part of the A-76 study.

The GAO took the protest under review and ultimately sustained it using the following line of reasoning:

While our Office does not review internal Agency decisions regarding matters not the subject of a solicitation, where as here, an Agency has conducted an A-76 competition, thus using the procurement system to determine whether to contract out or perform work in-house, we will consider a protest alleging that the Agency has not complied with the applicable procedures. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. We conclude that, in light of this significant conflict of interest on the part of the evaluators, the evaluation was invalid and did not furnish a proper basis for cancellation of the solicitation. [Ref. 14]

The Government Agency argued that it was aware of the possible conflict of interest but had no choice because there were not enough other qualified evaluators available to sit on the evaluation teams. The Government said they increased surveillance and physical segregation of the

evaluators in an attempt to mitigate any possible conflict of interest. The GAO disagreed with the Government's defense stating that the only way they could ever achieve impartiality in the process would be to completely reconstitute the evaluation team.

4. Cost Comparison Issue (Best Value Leveling/In-House Cost Estimate Problems)

Matter of: COBRO Corporation, B-287578.2, October 15, 2001.

In this case the protestor (COBRO Corporation) contended that the original request for proposal (RFP) stated that the final proposal to be competed against the MEO would be the one that provided the overall best value to the Government. COBRO was picked by the Government to compete against the MEO. The cost comparison resulted in the MEO's cost being under COBRO's proposal by nearly 50%. COBRO immediately filed an administrative appeal with the Government Agency in accordance with the A-76 process guidelines. The Administrative Appeals board sustained several of their objections. However, it still ratified the Government's decision to go forth with the implementation of the MEO knowing that a substantial increase in costs would be required. It based this decision on the belief that the increase in costs would still be less than COBRO's final cost. COBRO then filed an immediate protest with the GAO citing two major concerns:

1) The RFP improperly required private-sector offerors to propose their own facilities to physically store inventory rather than use existing and available Government facilities as was done under the adjusted MEO, and that the Agency did not properly account for the

comparable cost under the MEO in making the cost comparison; and

2) That by the terms of the RFP and by its conduct of discussions, the Agency solicited offerors to propose technical performance enhancements, but did not consider any evaluated enhancements in COBRO's proposal. [Ref. 12]

The GAO made its decision to review and then sustain the protest based on the following principle:

To preserve the integrity of the A-76 cost comparison, private-sector offerors and the Government must compete on the same scope of work. The MEO and the private-sector proposals must, first, comply with the minimum PWS requirements, then where a "best-value" approach is taken in evaluating private-sector proposals, the Agency must perform a direct comparison between the non-price aspects of the MEO to the private-sector proposal to determine whether the successful private-sector proposal offers quality and performance exceeding the PWS requirements, such that the in-house offer must be brought up to the private-sector proposal's level of performance and quality. [Ref. 12]

The Government Agency realized their mistake in not making the storage facilities available to the contractors in the RFP. The GAO decision to sustain the protest was made on the same basis. The Agency's inclusion of an unjustified restriction in the RFP prejudiced COBRO and may have had an uncalculable effect on an even greater field of possible competition.

5. Cost Comparison Issue (Reversing of Initial Cost Comparison)

Matter of: Trajen, Inc., B-284310, B-284310.2, March 28, 2000

In this case the protestor's (Trajen, Inc.) primary concern is with the reasonableness of the Government Agency's decision for reversing an initial cost comparison conclusion. After the Government Agency selected Trajen's proposal as the most advantageous proposal for the purposes of the cost comparison with the MEO, the two cost comparison worksheets were completed and compared. Trajen made a proposal with a contract price of \$10,476,263. The Government made an upward adjustment to the proposal in order to include estimated contract administration costs, an estimated one-time conversion costs and a minimum 10% price differential. After the adjustment was made Trajen's proposal ended up being \$12,711,615 and the in-house performance was \$12,713,463. Based on these figures Trajen was selected for the award.

In accordance with the administrative appeals procedures, both the National Association of Government Employees and Trajen filed appeals challenging the results of the cost comparison results. The Government appeal authority adjusted the cost comparisons resulting in the reversal of the award to Trajen. Trajen subsequently filed a protest with the GAO. The GAO made its decision to review and then sustain the protest on the following principles:

Where, as here, an Agency has conducted a cost comparison under OMB Circular A-76, thus using the procurement system to determine whether to contract out or to perform work in-house, our Office will consider a protest alleging that the Agency has not complied with the applicable procedures in its selection process or has conducted an evaluation that is inconsistent with the solicitation criteria or is otherwise unreasonable. To succeed in its protest, the protestor must demonstrate not only that the Agency failed to follow established procedures, but also that its failure could have materially affected the outcome of the comparison. [Ref. 16]

The sustainment decision by the GAO was determined on three issues that when taken as a whole were considered material.

- 1) Appeal authority failed to recognize that the Government did not propose personnel to perform spot painting.
- 2) Appeal authority improperly applied non-service industry classification, which when corrected resulted in Trajen's price being lowered for the cost comparison.
- 3) Appeal authority used an unreasonable amount when calculating one-time conversion costs.

When all these factors were taken into account, GAO recommended Trajen be awarded the contract based on their total overall contract cost being \$86,866 lower than the government's projected contract performance costs.

G. SUMMARY

In this Chapter, the researcher presented a complete review of the GAO protest process and provided a complete breakdown of all the total GAO Bid protests and A-76

related protests filed with GAO from January 1, 1997 through December 31, 2001. It also broke out the major issues related to the dismissed, denied and sustained categories of the 49 A-76 related protests that cover the 1997-2001 period. The sustained A-76 protests principals are broken out and presented through a synopsis of five of the actual cases that were reviewed by GAO. In the next chapter, Chapter IV, the data presented in this chapter is used to provide an in-depth trend analysis of the A-76 process based on GAO's protest decisions.

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IV. ANALYSIS

A. INTRODUCTION

This chapter provides an in-depth analysis of the data presented in Chapter III. It makes comparisons and shows the trends between the 1997-2001 period GAO bid protest statistics with the 1997-2001 A-76 related protests statistics. Then, the GAO decisions as they relate to the A-76 related protest categories (dismissed, denied and sustained) are each individually analyzed. The sustained category focuses specifically on the four principle categories that were presented in Chapter III.

B. COMPARISON OF TOTAL BID PROTEST TO A-76 PROTESTS

Total A-76 & GAO Bid Protest Statistics Calendar Year 1999-2001						
	A-76		GAO			
Total Protests		49		1836		
Merit Protests		45		1750		
Sustained Protests		23		307		
Denied Protests		22		1443		
Dismissed Protests		4		86		
Sustainment Rate		51.11%		17.54%		
GAO Bid Protest Statistics (Calendar Year)						
	1997	1998	1999	2000	2001	Total
Merit Protests	456	417	332	274	271	1750
Sustained Protests	68	65	67	55	52	307
Denied Protests	388	352	265	219	219	1443
Dismissed Protests	51	17	5	7	6	86
Sustainment Rate	14.91%	15.59%	20.18%	20.07%	19.19%	17.54%
A-76 Related Bid Protest Statistics (Calendar Year)						
	1997	1998	1999	2000	2001	Total
Merit Protests	1	4	10	8	22	45
Sustained Protests	0	0	7	5	11	23
Denied Protests	1	4	3	3	11	22
Dismissed Protests	0	1	0	1	2	4
Sustainment Rate	0.00%	0.00%	70.00%	62.50%	50.00%	51.11%
Percentage of Total	0.22%	0.96%	3.01%	2.92%	8.12%	

Table 4.1 Bid Protest Statistics Totals

Table 4.1 is very similar to the summary table (Table 3.1) that was presented in Chapter III. The difference is Table 4.1 includes the sustainment rates for the total GAO and A-76 related protests, and the percentage rates that the A-76 related protests make up of the total GAO protests. Analysis of the data provided in this table shows that a number of different trends began to rise after the Secretary of Defense put a renewed emphasis on the A-76 process in 1997. During the five-year period from 1997 to 2001, the total number of merit protests declined. In 1997, contractors made 456 total protests; by 2001, this number had declined to 271 protests (see Figure 4.1). During this same period the opposite effect occurred with the A-76 related protests, in 1997 there was only one A-76 related protest made to the GAO, by 2001 this number increased to twenty-two protests.

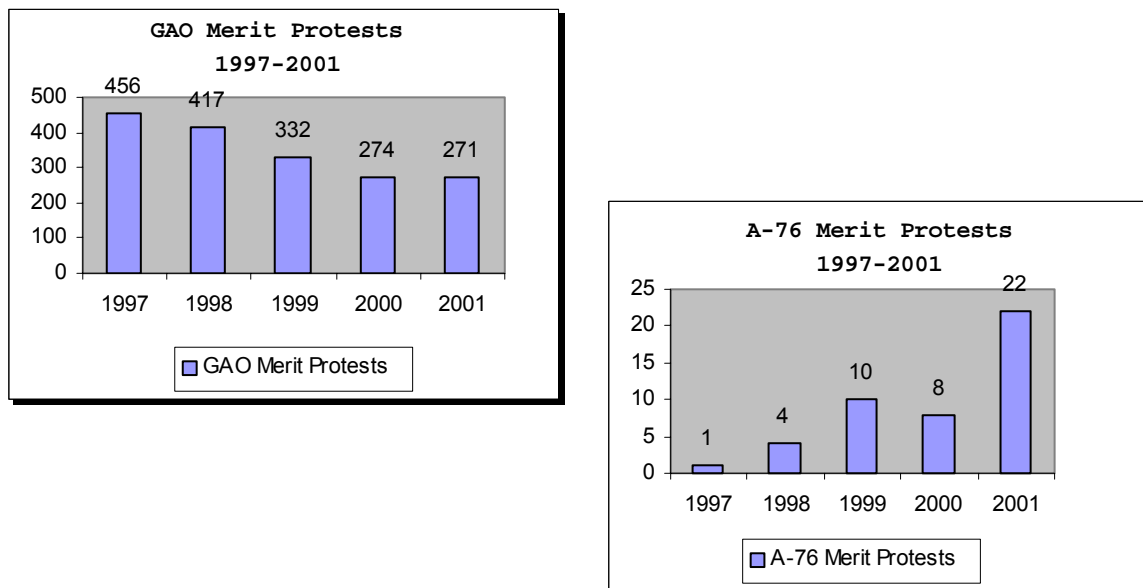


Figure 4.1 Total Protest Trends 1997-2001

When the total GAO merit protests and A-76 related merit protests, represented in Figure 5 are put together, the result is an upward trend in A-76 related protests as a percentage of total GAO protests. The A-76 related protests increased from a mere 0.22 percent in 1997 to 8.12 percent in 2001. Figure 4.2 shows a graphic representation of this trend.

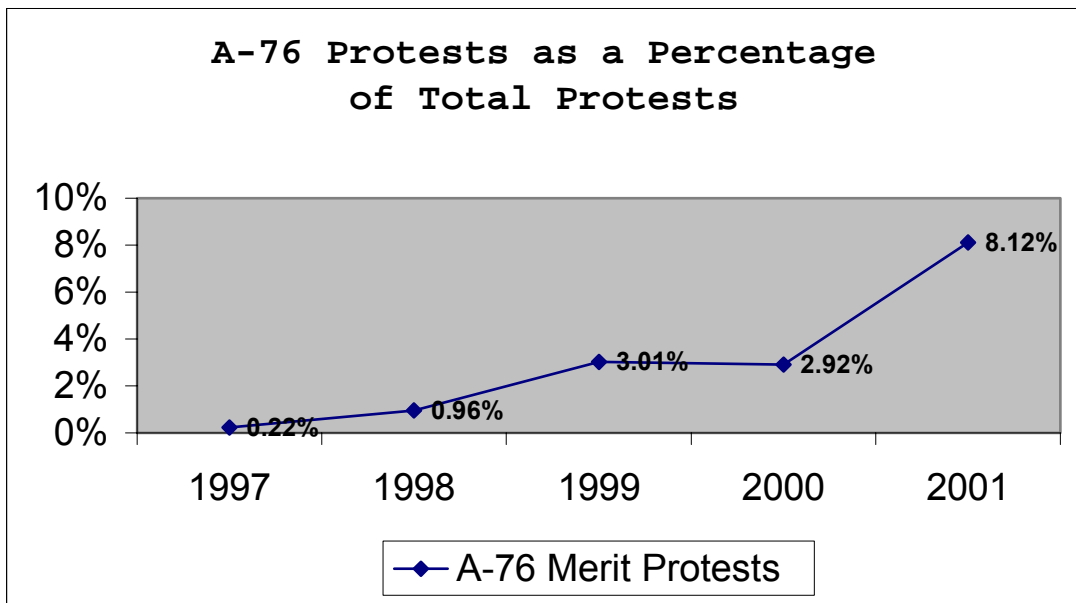


Figure 4.2 A-76 Protests as a Percentage of Total Protests

As is pointed out in the introduction of this thesis, the DRI of 1997 called for 120,000 civilian positions to be reviewed using the OMB Circular A-76 process from 1998 through 2002. This mandate of reviews written into the DRI resulted in an increase of more than three times the number of positions being reviewed over a five-year period than were reviewed over the previous twenty-five years. It is logical to draw the conclusion that if there was an increase in studies conducted over this period that an

increase in protest would occur. However, given the scope of the thesis and the data collected, it is difficult to take this assumption any further.

Another conclusion that is drawn, using similar logic, is that since the Secretary of Defense mandated the increase in studies, the Service Secretaries also put an increased emphasis on more of their respective activities to apply the A-76 process. If the A-76 process previously had not been used at many of these activities, it is probable that there would be more of a chance for mistakes to occur when applying the process. Since the A-76 process can take up to three years, it is also probable that the total number of protests would begin to increase in 1999, which Figure 4.2 reveals. A trend to look for in the future is a decrease in A-76 related protests starting somewhere around 2003 as the learning curve of the A-76 process begin to kick in. The analysis of the sustained protests that is presented later in this chapter points out four specific areas of the A-76 process that Government Activities seem to be having difficulty with.

Table 4.1 also includes the sustainment rates for both the Total GAO Merit Protests and the A-76 Related protests. This data is depicted graphically in Figure 4.3. The number of total GAO merit protests that were sustained between 1997 and 2001 fluctuated between fourteen and twenty percent, whereas the number of sustained A-76 related protests fluctuated between zero and seventy percent between the same time period. The average sustainment rate percentage over the five-year period for

total GAO merit protests was 17.5 percent and 51.1 percent for A-76 related protests.

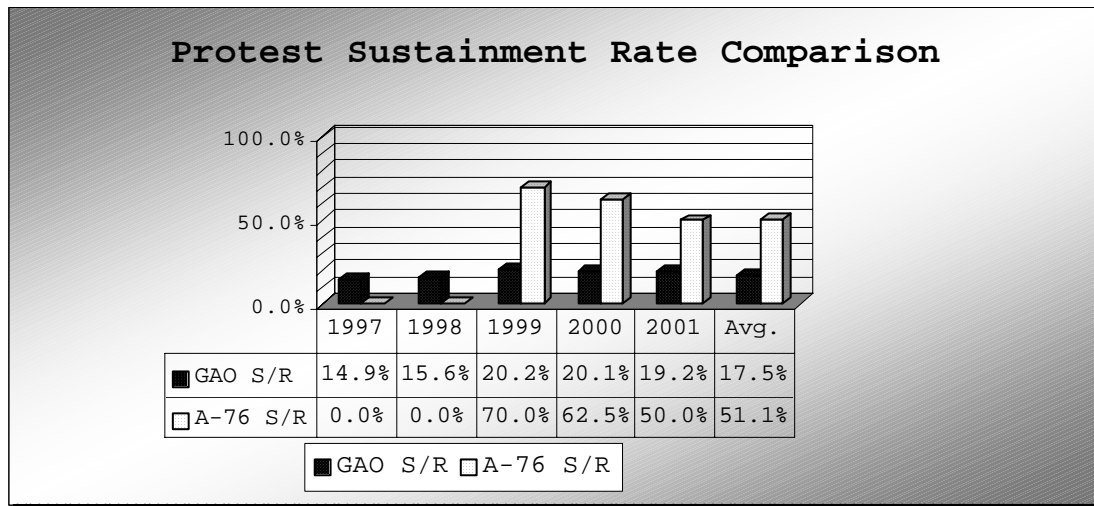


Figure 4.3 Protest Sustainment Rate Comparison

One conclusion that can be drawn from looking at the difference between the two average sustainment rates over the five-year period is the familiarity or lack of familiarity the acquisition force has with the A-76 process. GAO reviews a number of different acquisition issues that land on their docket every year. The average sustainment rate for total protests, 17.5 percent, shows that for the majority of the issues, the acquisition force is applying the rules and processes correctly. Conversely, a 51.1 percent sustainment rate for the A-76 related protests leads to the conclusion that the acquisition force, and the other personnel involved in applying the A-76 process, are still figuring out how the process works. The A-76 process is challenging the workforce. The specific areas of the A-76 process that are the most challenging a regular basis are discussed in the next three sections of this chapter.

C. ANALYSIS OF DISMISSED A-76 RELATED PROTESTS

The Researcher believes there are lessons that can be learned by looking at the four A-76 related protests that were dismissed between 1997 and 2001. The first lesson is GAO seems to be making the point that it will support the A-76 process and the acquisition process, as they exist in their respective current designs. Two of the four A-76 related protests that were dismissed were dismissed for being premature. In one case, the protestor filed the protest prior to being debriefed by the Contracting Officer after not being selected as the proposal for comparison with the MEO, GAO dismissed it as premature telling the contractor to follow the rules. The second protest was dismissed as premature because the protestor, after having its appeal upheld by the appeals authority in the A-76 process, failed to allow the agency to take any corrective action. In both cases, the GAO sent the signal that the protestors need to allow the system or process to work as it is designed.

Another lesson is that if a contractor does not follow the guidelines outlined in the GAO Bid protest process, their complaint may never be heard. In the A-76 related case discussed in Chapter 3, the protestor filed its complaint after the 10-day calendar window required by the GAO Bid Protest Guidelines. Even though the protest was filed late, the GAO considered it under the "significant issue" or "good Cause" exception. To meet this requirement the protest must "raise issues that have not been considered on the merits in a prior decision and that are a widespread interest to the procurement community". [Ref.

13] If the GAO did not follow their guidelines, they would run a chance of receiving protests years after the basis for the alleged protest occurred, making it very difficult to ever review a case properly.

A final lesson learned from the dismissed A-76 related protests is that the protestor must fit the definition of an interested party in order for their protest to be heard by the GAO. In the case described in Chapter 3, the federal employees and the unions representing them were not considered interested parties by the GAO's definition, which requires the parties to be actual or prospective bidders. The GAO did not say they would not look at a case if it involved procedural application problems of the A-76 process. It said that it would not look at a protest presented by the federal unions that asserts that the federal employees or their union will be adversely affected by an Agency's decision to contract out vice keep it in house. If the GAO reviewed cases based on the employees being adversely affected by the A-76 process, it is very possible that every A-76 study would be protested. The bottom line is that GAO will review A-76 process applications problems but not protests that could have a negative affect on the employees' lives.

D. ANALYSIS OF DENIED A-76 RELATED PROTESTS

Although the twenty-two merit protests in this category were denied, the Government should take one general lesson from this group of protests. The old adage that "perception is reality" needs to be taken to heart. The fact that the contractor took the time to file a protest means that they believe (or perceive) that

something went wrong in the application of the A-76 process. Some argue that it only takes a 34-cent stamp to make a protest, but the reality is that when a company files a protest they have to spend a lot of money defending their position. The protestors genuinely believe they have been treated unfairly and use the GAO Bid protest process as an avenue to seek recourse. The main point here is that although the twenty-two protests were denied, the parties that levied the protests have the perception that somewhere in the process something was not done right.

E. ANALYSIS OF SUSTAINED A-76 RELATED PROTESTS

This area of the thesis should be given a serious amount of attention. When the GAO sustains a protest, they are saying that the Government has made a mistake. In Chapter 3, four general categories emerged as areas that the GAO has been finding in favor of the protestors in A-76 related cases. The four categories include the area of Conflict of Interest, Unduly Restrictive Competition, Requests for reimbursement of protest costs and various problems in the area of creating the Cost Comparison.

Before the four areas of concern are individually analyzed, the data from the protests that were denied, when there is a proper fit, are combined with the four categories of the sustained protests that were looked at. When the data is combined, interesting trends emerge (See Figure 4.4)

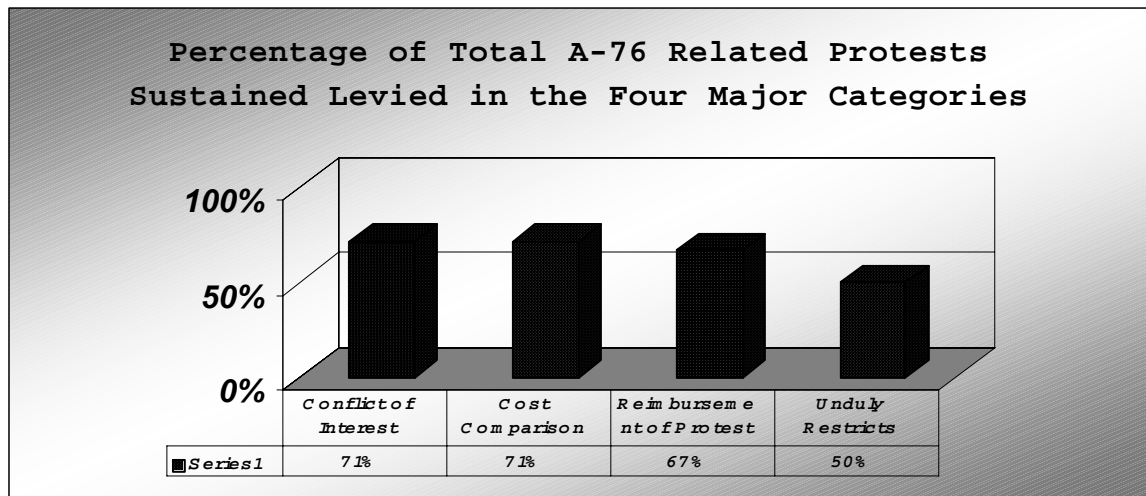


Figure 4.4 Sustained Protests Broken Out By Category

The key point to take from Figure 4.4 is that between 1997 and 2001, when an A-76 related protest was levied in any of the four major categories identified in the chart, there was a 50 to 71 percent chance that the protest would be upheld. This high range in percentages highlights the importance of the GAO decisions relating to these issues. These four categories covered thirty-three of the forty-five A-76 related merit protests review by the GAO from 1997 to 2001. The reasons why the protests had such a high percentage chance of being upheld are discussed by category in the rest of this chapter.

1. Conflict of Interest

In the area of Conflict of Interest, the GAO sustained ten of fourteen protests in this category. The lesson learned here is that the Government Agency must take the necessary steps to ensure all the evaluations in the process are conducted with impartiality. The general rule should be to rigorously avoid any conflict of interest or

even the appearance of a conflict of interest in Government-contractor relationships at all times.

When the A-76 and Contracting Teams are being formed in the second step of the A-76 process, the Contracting Officer must step back and look at the teams that are being created. He must take the view of an impartial outsider. In the protest that was discussed in Chapter III regarding the category of conflict of interest, the Contracting Officer should have used a "perception" check. He should have asked himself what an outsider might think. A particular lesson that should always be kept in mind is that if it looks bad i.e., picking 14 of the 16 evaluators from the activity that is under study, it will more than likely look bad to the GAO.

In this case, the Contracting Officer made the statement that he did not have enough qualified people within his command to sit on the evaluation team other than those that were chosen from the activity under study. This being the case, he should have continued to look for other options when designing the team. He could have trained other personnel or picked evaluators from outside his command. The argument he could make to counter the options is that taking these steps would be difficult and time consuming. He needs to realize in the end, the amount of time and effort put into defending a protest may ultimately be more than the extra time and effort that is put in the front end of the A-76 process.

One other area the Contracting Officer must be cautious of is a possible conflict of interest becoming an issue when assigning the personnel to write the PWS and the

In House Cost Estimate. According to the GAO's decision in Matter of: The Jones/Hill Joint Venture, the GAO decided that these two people should be different. The GAO references FAR Subpart 9.5 in making its opinion that this is considered a conflict of interest. This part of the FAR discusses the agency's obligation to reasonably avoid "unequal access to information" and "biased ground rules". [Ref. 6] The GAO makes the point that, "it is difficult to see how there can be a level playing field between public and private offerors" where one competitor, in this case the MEO team, receives a competitive advantage by having written and edited the PWS.

One of the points made in Chapter 2 regarding some of the limitations of the A-76 process, indirectly refers to one of the unintended consequences that occur because of continual perceived conflicts of interest. If the private sector begins to see the A-76 process as a bad business decision as a result of unfair competition i.e., conflicts of interest that favor the Government agency, the private sector companies will start to quit competing in the A-76 competitions. The GAO has shown the Government that it will sustain the majority (71 percent) of the protests where conflict of interest is an issue.

2. Unduly Restricts Competition

A second categorical trend that has emerged in the review of the A-76 related protests is the area of unduly restrictive competition. This category finds its roots in basic human nature. Chapter II of the thesis brought up the issue of resistance from the workforce when conducting A-76 studies. This resistance makes sense; the A-76

process requires the Government employees to assist the contractors when making their proposals. When the employees are being asked to do this, they often do not want to willingly give information to the contractors. Doing so could ultimately result in losing their job or working for a contractor for less money. This essentially creates an "Us vs. Them" relationship between the Government Agency and Contractors competing in the process.

It is the Contracting Officer's job to remain impartial when dealing with this phenomenon. If the Contracting Officer lets himself lose his impartiality, he may inadvertently begin to create a situation that could ultimately result in unduly restrictive competition. This occurred in the BMAR Associates protest that was outlined in Chapter III. The GAO found that the Government Agency had written a RFTP that required the offeror to submit a lump sum bid without having the necessary information to create a competitive bid. This is the type of situation that the Contracting Officer is responsible for keeping from happening.

3. Reimbursement of Protest Costs

A third trend that has surfaced is after the protestors initially protest an action, the protest is denied or dismissed and then the protestor comes back later and asks to be reimbursed for the protest costs. In most cases, once the GAO has dismissed or denied a protest, it will not recommend that the protestor be paid for their protest costs.

In the request for reimbursement case that was discussed in Chapter III, the GAO sustained the protestor's

second protest for costs after it had already dismissed the protestor's initial protest. In this case, the GAO seemed to be sending a signal to the Government Agency. Although the protest had been dismissed, an ADR conference that was chaired by a GAO attorney, which basically found the protestor's case to be meritorious, was ignored by the Government. When the Government Agency failed to take any corrective action after the ADR, the protestor resubmitted its protest for reimbursement of costs. The GAO upheld its request. The GAO sent a message to the Government Agency that it should not play games with the protestors by using the GAO Bid protest process.

4. Cost Comparison Issues

The category of Cost Comparison Issues is for the most part the most challenging of the four categories Government Agencies are dealing with today. Like the Conflict of Interest category, the GAO upheld 71 percent of all A-76 related protests made in this category. However, unlike the Conflict of Interest category, the Cost Comparison issues seem to be more difficult to solve. Interpretation is a key factor in this area. The analysis of this category has been subdivided into two main areas of concern, problems with Best Value leveling and accurate In-house Cost estimates, and Reversal of initial decisions.

a. Best Value Leveling and Accurate In-house Cost Estimates

The challenge that Contracting Officer's are dealing with in this area revolves around first picking a proposal that is based on best value and, when necessary, trying to find a way to fairly level the Government's proposal in order to ensure the final cost comparison is

being made on level playing field. "To preserve the integrity of the A-76 cost comparison process the private-sector offerors and the Government must compete on the basis of the same scope of work." [Ref. 12] The protests that are being levied at the GAO are showing that the Government is having a very difficult time doing this.

The difficulty stems from having to shift the entire thought process after the best value decision has been made. The winner of the final cost comparison is made on best value. Combining Best Value and low cost is difficult. Before the Cost Comparison occurs the MEO has to be reviewed and compared to the winning proposal from the private sector by the SSA. If the performance of the MEO and the private sector proposal do not match, leveling has to occur. The MEO has to revise its technical proposal and cost estimate before the agency conducts the final cost comparison. The problem is that when leveling occurs between the MEO and the private sector proposal, technical data cannot be passed to the MEO team. If this happens, the private sector proposal becomes free consultation for the Government Agency. The long-term effect is the contractor loses any incentive to propose innovative ideas or a higher level of performance in future competitions.

The numbers of different leveling issues that can occur in a proposal are endless. In the case that was discussed in Chapter III, the Government failed to remove the cost of storage facilities that they erroneously left out of the PWS. This had a drastic impact when the cost comparison was completed. Ultimately GAO sided in favor of the protestor. The problem is that the Government should

be picking up these types of issues in the review and leveling process, the scope of the work needs to match in order to maintain the integrity of the A-76 process.

b. Reversal of Initial Cost Comparison

This area was broken out from the Best-Value category because it deals with the area of perception. In a few cases, the GAO sustained protests based on the Government reversal of the initial cost comparison decision. The GAO decision did not decide in favor of the protestor merely because the Government changed its mind. The GAO went through the process of checking all the numbers, recalculating and then sustaining the protests. The problem here is that the Government made, on more than one occasion, a mistake by reversing their decision.

As discussed in Chapter II, many businesses are no longer competing in the A-76 arena because they see it as a bad business decision. The studies where the cost comparison decisions are changed exasperate this problem. Why would a company want to compete when after it had been told, after a three-year process, that it won the competition that decision was later overturned? The more times this phenomena occurs, the fewer companies will want to compete.

The bottom line in this area is that the Government needs to be careful when they are making their decisions. Although they may not be intending to send the signal that they are "Gaming the System" to keep an activity in-house, many companies may perceive this as the case.

F. SUMMARY

In this chapter, the researcher documented a trend analysis of GAO protest decisions. The trend analysis indicates that the number of A-76 related protests increased as the requirement to compete more Government Activities with the private sector increased. It then examined the three categories of A-76 protests and the lessons learned from each of them. It concluded by highlighting four major issues that have begun to emerge as the number of A-76 related protests has increased. Those common issues highlighted in the final section are the issues that procurement professionals need to look at when conducting an A-76 study.

The next chapter will provide conclusions, recommendations and answers to the primary and secondary research questions. It will also include suggested areas of further research.

V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

The primary purpose of this thesis was to determine if the A-76 related protests that were made to the GAO from January 1, 1997 through December 31, 2001 were uncovering any major trends related to the A-76 process. The goal was to identify the trends, and if the trends were found to be deficiencies, to make recommendations on how the acquisition force could properly address the issues.

This chapter presents the researcher's conclusions and makes recommendations of possible pitfalls that the acquisition community should consider when applying the A-76 process today. The conclusions are presented by reviewing the primary and secondary research questions. The chapter concludes with the researcher's recommended areas for further study and analysis.

B. CONCLUSIONS

- 1. What are the key case principles and trends involving the A-76 Process brought before the General Accounting Office (GAO), and how might this information be used to improve the Department of Defense's Acquisition Process?**

The analysis of the total protests and the specific A-76 related protests that were reviewed by the GAO from 1997 through 2001 resulted in two major trends and four major case principles. These are issues that acquisition professionals should keep track of and take necessary action to prevent when conducting an A-76 study.

The first key trend that surfaced was the overall change in the number of A-76 related protests that were

being reviewed by the GAO. Although the total number of GAO merit protests decreased over the five-year period, the total number of A-76 related protests was on the rise. The researcher believes that the increase in A-76 related protests is primarily the result of the increased number of studies that the 1997 DRI mandated. The increase in A-76 related studies increased the number of activities using the A-76 process, which in turn resulted in a learning curve effect. The researcher believes the total number of A-76 related protests will begin to decrease as the activities begin to apply the process more effectively.

The second major trend that emerged in the analysis was the difference in sustainment rates between the total GAO Merit protests and the A-76 related protests. Over the five-year period that was reviewed, A-76 related protests had an average sustainment rate of 51.1 percent, whereas the Total GAO protests had an average sustainment of 17.5 percent. The researcher believes this is a result of the overall lack of familiarity the Acquisition force has with the A-76 process. As Chapter 2 points out, the A-76 process has gone through several changes over its 35-year history. In addition, up until the push for A-76 studies was mandated in 1997, the use of the A-76 process by activities was not a regular occurrence. Because the activities applying the process were not using it regularly, they were prone to make mistakes. With time, as the activities review the lessons learned and key principles for the sustainment of the GAO protests, this sustainment rate will decrease.

The four major case principles that resulted from the review of the A-76 related protests came from the protests that were sustained by the GAO. The first principle that emerged from the research dealt with the area of conflict of interest. Thirty one percent of the A-76 related protests that were seen by the GAO dealt with the area of Conflict of interest, 71 percent of these protests were upheld. The conclusion here is that Government Agencies need to pay special attention to the areas of the A-76 process that may result in possible conflicts of interest. Specifically the Contracting Officer needs to be careful when selecting the personnel who will sit on the evaluation teams and who will write the PWS and the IHCE.

The second major principle that was identified in the A-76 related protest results was the creation of unduly restrictive competition. This occurs when the Government Agency fails to write a PWS that the contractor can decipher well enough to compete on. The other issue that is tied to the unduly restrictive competition is the support the employees give the contractor when it is trying to develop its proposal. Although it is a competition, the employees are still required to give some basic information in order for the contractor to develop a competitive proposal.

The third major case principle that surfaced related to the GAO supporting the contractor's protest to be reimbursed for protests costs after it had its original protest dismissed. The lesson here was that the Government should not play games with the protestors. If the GAO takes the time to complete an ADR, and then dismisses their

protest on the premise of the ADR, the Government should take the corrective action recommended. Otherwise, the GAO will make the Government pay the protest costs.

The final major case principle that materialized in the research dealt specifically with the cost comparison step of the A-76 process. Thirty one percent of the A-76 related protests made from 1997-2001 were related to the cost comparison decision and 71 percent of these protests were upheld. The researcher believes that this is the step in the A-76 process that needs special attention. It is imperative that the SSA ensures that the MEO has been properly aligned to meet the same performance standards as the competing offer, prior to completing the cost comparison. Otherwise, the result will be comparing two proposals that do not meet the same scope of work.

The other issue that emerged as a result of cost comparison problems was the reversal of proposals after the final decision had been made. The questions that surfaces are, what was the reversal of the initial decision based on and was the initial cost comparison completed incorrectly or was the initial decision bad? In order to stop further decisions from being reversed, there needs to be a balancing of the review process that helps to ensure the integrity of the system while maintaining the need for efficiency in the system. It is the researcher's opinion that if the process is not fixed and a balance is not achieved, reversals will continue to occur, which will ultimately result in the private sector competing in the A-76 competitions.

These four case principles are key areas that the acquisition force should primarily focus on when conducting an A-76 study, if they intend to keep their A-76 studies from being protested.

2. What is the history and background of the A-76 process?

Chapter II of this thesis gives a full description of the history and background of the A-76 process dating back to its origins in the 1955 Eisenhower Administration. The conclusion that should be drawn from the background description is that although the process was slow to start in the Mid 1960s, in 1997 the A-76 process was reborn as the efficiency tool of choice for use throughout the Federal Government. It was planted in the DRI in 1997 and then given teeth through the FAIR Act in 1999. Over the life of the process, it has gone through several facelifts ultimately emerging as a complex efficiency tool that is used regularly by the acquisition community today.

3. How has the A-76 process been applied throughout the DoD?

Based on the GAO protest trends that were depicted in Chapter III and IV, when the A-76 process is compared to other acquisition processes, there is a steep learning curve effect. This conclusion is based on comparing the average sustainment rate for all GAO merit protests, which was 17.5 percent, to the A-76 related protests average sustainment rate, which was 51.1 percent from 1997-2001. The researcher believes that acquisition professionals are still learning how the A-76 process works. As pointed out earlier, over time this sustainment rate should begin to decrease as the familiarity with the process increases.

4. What problems, if any, have resulted from DoD's application of the A-76 process?

The problems that resulted from the application of the process were outlined in the first question answered in this section. To summarize, the three primary problems that have emerged in the application of the A-76 process include:

- a. Problems Associated with Conflicts of Interest;
- b. Issues involving Unduly Restrictive Competition; and
- c. Problems Involving the Cost Comparison step of the A-76 process.

These three major application issues surfaced in the thesis research. Acquisition professionals need to take special note of the issues and look for ways to keep them from occurring in the future.

5. What benefits, if any, has DoD realized because of the A-76 process?

Although the research completed for this thesis did not specifically result in any specific identifiable or quantifiable benefits that are being realized by the A-76 process, the researcher believes that in theory the application of the A-76 process itself, if done correctly, is an enormous benefit. The A-76 process is designed to create efficiencies through the introduction of competition in organizations that are normally void of competition. The efficiencies occur when the Government Agency creates the MEO to compete with the private sector's best value proposal. Regardless of who wins the cost comparison, efficiencies are created when the MEO or winning private proposal is implemented.

C. RECOMMENDATIONS

DOD Acquisition professionals should be made aware of the key case principles that were identified in this thesis' Conclusion Section. By understanding the key case principles, they will be able to take steps to avoid possible problem areas in the A-76 process that are most likely to draw a protest. Based on the analysis of the key case principles identified and discussed in Chapter III and IV, DoD acquisition professionals should:

- a. Avoid possible conflicts of interest issues by having the Contracting Officer pay special attention when developing the evaluation teams; if necessary go to other commands to fill the team;
- b. Inform the team that it is their responsibility to remain impartial. Reiterate the point that the A-76 process is not a win/lose competition it is a competition that is set up to chose the best option to support the Government.
- c. Make sure that the person(s) assigned to write the MEO is not the same person(s) assigned to write the In-house cost estimate.
- d. Communicate with employees whose jobs are under study, explain that although it may not seem like it is in their best interest if they do not support the A-76 process, there is a good chance the process will end up at the GAO.
- e. When an ADR is finished, and both parties have agreed to certain actions, make sure the actions

are followed through. Failure to do so can result in subsequent protests.

- f. Pay special attention when creating the PWS, this document is the key document in the A-76 process.
- g. Ensure that the MEO has been leveled fairly and that it meets the same performance requirements the private sector proposal is achieving in order to result in an "apples to apples" vice "apples to oranges" comparison.
- h. Ensure that the final cost comparison has been completed correctly prior to releasing the final decision. Wherever possible try not to put the Government in the position of having to reverse its initial decision.

D. SUGGESTED AREAS FOR FURTHER RESEARCH

During this study, the researcher found the following areas that warrant further research:

- a. In 2006, conduct follow-on analysis of the protests brought before the GAO from 2002 through 2006 to determine if there was an actual learning curve associated with the A-76 process. Include in this analysis a review of the four key case principles identified in this thesis.
- b. Conduct an analysis that looks at the actual number of studies completed by the DOD from January 1, 1997 to December 31, 2001. Do a trend analysis using the data collected in this study to see if there is an increase or decrease in the

total number of protests being levied on an annual basis.

- c. Conduct an analysis that reviews the actual cost savings that DOD claims to be achieving as a part of the A-76 process. Include in the analysis both short term and long term cost analysis.

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APPENDIX A

A-76 RELATED GAO BID PROTESTS 1997-2001

Dismissed			Sustained		
Protest #	Date		Protest #	Date	
1	B-281082	12/22/1998	1	B-281224	1/12/1999
2	B-282904.2	6/7/2000	2	B-281224.2	1/12/1999
3	B-288507	9/7/2001	3	B-281224.3	1/12/1999
4	B-287070	1/31/2001	4	B-281224.4	1/12/1999
Denied			5	B-281224.5	1/12/1999
1	B-277614	11/3/1997	6	B-281224.6	1/12/1999
2	B-278187	1/5/1998	7	B-281664	3/18/1999
3	B-280431	9/29/1998	8	B-283727.2	2/22/2000
4	B-280988	12/17/1998	9	B-284310	3/28/2000
5	B-280988.2	12/17/1998	10	B-284310.2	3/28/2000
6	B-281323	1/25/1999	11	B-284997	6/29/2000
7	B-281199.2	3/4/1999	12	B-283817.3	12/19/2000
8	B-283055	9/23/1999	13	B-286714.2	2/13/2001
9	B-285841	10/17/2000	14	B-286194.3	3/27/2001
10	B-286271	12/1/2000	15	B-287189	5/14/2001
11	B-286194.2	12/8/2000	16	B-287189.2	5/14/2001
12	B-287121	3/30/2001	17	B-284833.3	7/17/2001
13	B-287270	4/12/2001	18	B-284833.4	7/17/2001
14	B-284997.2	5/18/2001	19	B-283727.3	8/22/2001
15	B-285938.6	7/13/2001	20	B-287578.2	10/15/2001
16	B-286714.3	8/20/2001	21	B-286194.4	12/5/2001
17	B-288392	10/23/2001	22	B-286194.5	12/5/2001
18	B-288392.2	10/23/2001	23	B-286194.6	12/5/2001
19	B-288636	11/23/2001			
20	B-288636.2	11/23/2001			
21	B-285938.7	12/4/2001			
22	B-285938.8	12/4/2001			

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